

SCOTT C. HOOK
COMMONWEALTH'S ATTORNEY

JAMEY E. COOK
DEPUTY COMMONWEALTH'S ATTORNEY



Sr. Assistant Commonwealth's Attorneys
ABIGAIL J. OWENS
CHARLES K. PETERS
AMY M. CASSANDRA

Assistant Commonwealth's Attorneys
ANTONIO R. BENEDI
ROSHNI DHILLON
DOUGLAS B. ROGERS

LORI I. JONES
Special Investigator

COMMONWEALTH OF VIRGINIA
Fauquier County Commonwealth's Attorney

January 15, 2020

ALTERED SAMPLE BALLOT OPINION LETTER

Issue

Does altering and disseminating sample ballots amount to a criminal offense under the Code of Virginia?

Facts For The Purpose Of This Opinion

It is alleged that two candidates (Candidates A and B) sought the endorsement of the local Republican Party. Neither candidate met the threshold to receive the party's endorsement. On November 5, 2019, Election Day, Candidate A altered local Republican Party sample ballots in such a way as to suggest that they were the Republican Party endorsed candidate. While Candidate A denies handing out the sample ballots, we will assume for the purposes of this opinion that the ballots were in fact handed out by either Candidate A or one of their agents. Candidate A ultimately won the election, besting both Candidate B and the Democratic candidate. Subsequent to the election, Candidate B and several citizens filed complaints via email.

Analysis

Election Violations

The Commonwealth's Attorney is tasked with handling complaints and allegations of unlawful conduct pursuant to §24.2-1019 of the Code of Virginia, 1950, as amended. The allegations made by the citizenship and Candidate B are directly related to the November 2019, Fauquier County election, making this Commonwealth's Attorney's Office the proper investigative body.

Upon review of Title 24.2 of the Code of Virginia (hereinafter “Title 24.2”) it is clear that election violations are broken down into three general categories. The first category generally relates to misrepresentations in statements or forms required by Title 24.2, also referred to as “election fraud.” *See §24.2-1016 of the Code of Virginia*. The second category can be categorized as anti-oppression or anti-Jim Crow laws. *See §24.2-1015 of the Code of Virginia*. The third category relates to violations of law by the electoral officials or with the voting equipment. *See §24.2-1009 of the Code of Virginia*.

Accepting the above facts as true for the purposes of this opinion, the handing out of altered sample ballots is not a violation of Title 24.2. Sample ballots are not required by Title 24.2 and therefore are not subject to penalty under §24.2-1016. While §24.2-1005.1 does make it illegal to communicate false information to voters, the statute limits that information to “the date, time, and place of the election or the voter's precinct, polling place, or voter registration status.” *See §24.2-1005.1 of the Code of Virginia*. There are no allegations that threats, force or intimidation were used thus there are no violations of the anti-Jim Crow laws. Lastly, there are no allegations that the acts of Candidate A or her campaign team acted to corrupt election officials or in any way tampered with voting equipment or official ballots, thus category three is not offended.

Forgery

Criminal forgery is defined as “the false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability.” *McCain v. Commonwealth*, 2010 Va. App. LEXIS 399, at page 3 (2010). The common parlance of forgery is something “made falsely especially with the intent to deceive.” *See “Forged.” The Merriam-Webster.com Dictionary, Merriam-Webster Inc., <https://www.merriam-webster.com/dictionary/forged>. Accessed 14 January 2020*. There is no requirement that a forged document have a signature and a forgery can happen by many means. *See Muhammad v. Commonwealth*, 13 Va. App. 194, 196 (1991).

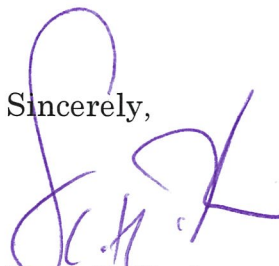
It is clear that the altering of sample ballots to suggest that Candidate A had the local Republican Party endorsement is a forgery in common parlance. That being said, it is also the opinion of the Commonwealth’s Attorney that a sample ballot does not create legal efficacy or is the beginning of legal efficacy. Stated another way, the

sample ballot does not create or avoid liability such that it satisfies the element of criminal forgery. *See generally Commonwealth v. Nelson, 50 Va. Cir. 330.* The Commonwealth's Attorney does acknowledge that the forging of actual ballots, even in a local bar association judicial nomination process, can amount to criminal forgery, it does not in this matter. *See generally Commonwealth v. O'Brien, 40 Va. Cir. 400 (1996).*

Conclusion

After reviewing the facts as alleged and all applicable law it is the opinion of this Commonwealth's Attorney that the altering of sample ballots does not violate Title 24.2 of the Code of Virginia as the sample ballots are not required under Title 24.2. It is also the opinion of this Commonwealth's Attorney that the altering of sample ballots does not satisfy the legal elements of criminal forgery as set out in §18.2-172 of the Code of Virginia. While this Commonwealth's Attorney does believe that such actions would violate the rules and policies of the local school system if perpetrated by a student, "not all chicanery is punishable criminally, and that is the reason that there are civil remedies afforded to individuals who may be injured by the fraud or deceit of some person." *Nelson, at 331.* Lastly the Commonwealth's Attorney has no opinion as to what, if any, civil remedies may be available.

Sincerely,



Scott C. Hook
Commonwealth's Attorney
County of Fauquier